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No. 99-1977

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

v.

ELLIOT M. KATZ AND
IN DEFENSE OF ANIMALS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, in a case alleging the use of constitutionally unreasonable force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, or merge, so that, if there is a material issue of fact precluding summary judgment, it is for the jury to decide when a federal government official has used excessive force in violation of the "objective reasonableness" standard of *Graham v. Connor*.

2. Whether the Seventh Amendment requires that when a person has had physical force used against him or her by a federal officer, and there is a material issue of fact as to whether the use of force was excessive, there is a right to have a jury decide if the use of force was objectively reasonable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 194 F.3d 962. The opinions of the district court (Pet. App. 17a-64a) are unreported.

JURISDICTION

Respondent joins in the jurisdictional statement of the Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

STATEMENT

On September 24, 1994, the public was invited to attend a special presentation by Vice President Gore and other speakers on the main post at the Presidio.[1] The event was to celebrate the Presidio's historic transfer from military post to national park on October 1, 1994. The conversion of the Presidio was a subject of public controversy, with animal rights activists concerned about the proposed use of the Army's Letterman Hospital for animal experimentation.

On the day of the celebration, Defendant Saucier was working as a military police officer. In his deposition, Saucier testified that he had been told by superiors that demonstrations would not be allowed. (Joint Appendix, hereafter, "J.A.") Saucier admits that Dr. Katz was "pointed out as one of the potential, you know, activists" and that he knew "who this person was . . . the person we needed to keep an eye on." J.A. 35-36

At the September 24 presentation, Dr. Katz, a veterinarian who was then sixty years old, and other members of In Defense of Animals (hereafter "IDA") were among the several hundred members of the public who attended

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[1] The public invitation included newspaper and radio advertisements in addition to mailings and a special toll free number for the public to find out about how to get to the event. The Presidio was already an open military base near the foot of the Golden Gate Bridge with thousands of civilians passing through daily without being stopped or checked in any other way. Judge Peckham had previously ruled in *CCCO-Western v. Fellows*, 359 F. Supp. 644, 649-650 (N.D. Cal. 1972), that the Presidio was an open base and, therefore, some first amendment activity had to be allowed.

the event. Dr. Katz was wearing a knee-high leg brace and no shoe because of a fractured foot. J.A. 20-21 He was sitting in the front of the crowd behind a gate and waist-high cyclone fence which blocked the public from the stage. As Vice President Gore began speaking about the Presidio becoming a global learning center, Dr. Katz, without saying anything, removed a cloth banner approximately 4 feet by 3 feet which stated: "Please Keep Animal Torture Out of Our National Parks" with the intent of displaying the banner by hanging it over the fence so that it could be read by Vice President Gore and the other speakers.

Before the banner could be placed so that it could be seen, one military police officer grabbed Dr. Katz from behind, and another tore the banner away. These individuals were Defendant Saucier and Steven Parker, an Army sergeant. Dr. Katz did not try to prevent the officers from taking the banner. The two military police officers then each took one of Dr. Katz's arms and aggressively half-carried, half-dragged Dr. Katz in a "bum's rush" to a military police van. J.A. 23-24.[2] Once at the military van, Defendant Saucier and Steven Parker violently threw Dr. Katz into the van.[3] As he was thrown into the van, Dr.

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[2] Contrary to the lengthy discussion by Petitioner assuming that Respondent is alleging excessive force separately for the way that Dr. Katz was carried to the van, Respondent is not claiming that merely his being dragged/carried with a splint on his foot was excessive force. Rather, it was the totality of the circumstances and particularly it was the gratuitous violent shove that Dr. Katz was given that was excessive.

[3] Defendant Saucier and Dr. Katz offer a markedly different description of these facts. Defendant Saucier states that despite

Katz was just able to protect himself from smashing into the floor or back of the van.[4]

The military police officers never spoke to Dr. Katz. He was kept in the van for about twenty minutes. They then drove Dr. Katz to a military police station. After being briefly detained, Dr. Katz was released and allowed to drive home. Dr. Katz was never informed of the basis for his detention or cited with any violation of any law or regulation.

Respondents accept Petitioner's statement of the procedural history of the case.

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the broken foot, knee-high brace and lack of a shoe, Dr. Katz resisted "by sticking his legs up on the bumper and pushing away." J.A. 39-40. Because of this resistence, Saucier states, "we had to use our heads putting him in the back of the vehicle." *Id.* Dr. Katz denies resisting in any way. J.A. 25 (Q. And when you got to the vehicle, what happened? A. They pretty much threw me in. Just shoved me in. Q. Did you attempt not to get put in? A. No.) The videotape corroborates his testimony. Parker did not testify that Dr. Katz resisted being put into the van. Instead he said that he used the minimum force necessary. J.A. 56.

[4] Saucier also claims that it was only Parker who gave Dr. Katz the shove, however, Saucier admitted in his deposition that he and Parker *both* put Dr. Katz into the van together. J.A. 39 (Q. And then once you got to the van, did you put him into the van? A. Did I put him in personally? I assisted putting him in the van. Q. Is it fair to say that you both put him into the van together? A. Yes, sir.) Parker also testified that Saucier helped. J.A. 55 (Q. Okay, did anyone help you to put Dr. Katz into that vehicle? A. Saucier helped me.)

SUMMARY OF ARGUMENT

Petitioner's brief is long on discussion and short on application. Legal reasoning should become more clear the higher the court. Lower courts need guidance, not abstraction. If applied, Petitioner's convoluted argument would unnecessarily supplant the well reasoned and well working case of ***Graham v. Connor,*** 490 U.S. 386 (1989) and in its place create a new and confusing judicial determination based on qualified immunity that second guesses the jury in violation of the Seventh Amendment. Rather than supplanting *Graham,* Respondents offer an application of *Graham* which satisfies the concern that all parties share that federal officials do not "exercise their discretion with undue timidity," *Wood v. Strickland,* 420 U.S. 308, 321 (1975), while abiding by the mandate of the Seventh Amendment. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 352 (1978) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." Rehnquist, J., dissent, quoting *Jacob v. New York,* 315 U.S. 752, 753 (1942)); *Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 730 ("The Seventh Amendment . . . entitle[s] the parties to a jury trial in actions for damages to a person or property . . . " Scalia, J. concurring, quoting *Ross v. Bernhard,* 396 U.S. 531, 533 (1970)).

Graham achieves this mixture of providing police officers the confidence they need in order to do their difficult job, while preserving the right to a jury trial when there is a genuine issue of material fact whether excessive force

was used. *Graham* instructs the lower courts that the threshold showing that an officer has not acted in an objectively reasonable manner is a high one. It is not enough to show that using 20/20 hindsight the officer could have made a better choice. *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.") By not allowing second guessing and arm chair quarter-backing *Graham* insures that officers will be insulated by making "allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving" *Id.* and providing "ample room for mistaken judgments." *Id.* Further, *Graham* also stands for the proposition that an officer does not need to use the least amount of force available, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment" *Graham* at 396-97 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1034 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)).[5]

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[5] Circuit courts, in a variety of situations, have followed *Graham*'s lead holding that an officer does not have to use the minimum amount of force. *Forrett v. Richardson*, 112 F.3d 416, 420-21 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1366 (1998) (shooting violent felony suspect was reasonable even if his capture through other means was inevitable); *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (use of "pain compliance techniques" to remove protestors was reasonable); *Plakas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994) (shooting of suspect was reasonable; officers not required to use available alternatives). Following *Graham*, these cases stand for the

The problem with Petitioner's long argument about the need to expand *Anderson v. Creighton*, 483 U.S. 635 (1987) is that it disregards the fact that *Graham* is already doing the job. ***Graham* works!** At most *Graham* needs reemphasis through this Court's opinion. Petitioner overlooks that *Anderson v. Creighton*, 483 U.S. 635 (1987) **came before *Graham v. Connor***, 490 U.S. 386 (1989). *Graham* has addressed for the excessive force area most of the concerns expressed in *Anderson*. The carry-over of legal reasoning from *Anderson* into *Graham* can be seen from Justice Scalia's opinion for the Court in *Anderson* using the phrase "objectively legally reasonable" *Anderson*, 483 U.S. at 641, and Chief Justice Rehnquist's use in *Graham* of the phrase "objective reasonableness." *Graham*, 490 U.S. at 397. Both cases at their core seek to balance the concern that "actions for damages may offer the only realistic avenue for vindication of constitutional guarantees," with the concern that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638.

Graham, along with the many cases that have both relied and built upon it,[6] along with this Court's

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proposition that even where the officer uses more force that the bare minimum necessary to take someone into custody, his conduct may be objectively reasonable.

[6] There is extensive case law following *Graham*. *Graham* has been cited 2,685 times in subsequent cases. This Court should be extremely reluctant to now adopt a new, supposedly higher, but not really, standard that will throw into question all that has

instruction that "insubstantial claims against government officials be resolved prior to discovery and on summary judgment if possible," *Anderson v. Creighton*, 483 U.S. 635, 640, fn. 2 (1987) gives the trial courts plenty of guidance, *and the language needed*, to dispose of cases prior to or at summary judgement. This combination of cases amounts to a high threshold showing by plaintiff to avoid summary judgment in a Fourth Amendment case attempting to hold an officer responsible for the use of excessive force. Further expansion of *Anderson* into the area of excessive force is unnecessary and unwise.

Where the case does proceed beyond summary judgment and to trial, *Graham* still provides a high threshold of protection for officers through jury instructions. Based upon the cases previously discussed, officers are entitled to a number of exculpatory instructions including "evidence of a mistake is not enough," "no 20/20 hindsight to second guess an officer," "officers do not need to use the least amount of force necessary," "not every push or shove is a violation of the Fourth Amendment," "officers are entitled to an allowance for making split-second decisions." *Graham v. Connor*, 490 U.S. at 396.

The simple truth is that these instructions in sum add up to a formidable defense at closing argument – a

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been accomplished with *Graham*. From its inception *Graham* has been, and remains, a landmark case because it has left a legacy, taking a complex body of conflicting law (circuits could not even agree to an objective or subjective test for excessive force cases prior to *Graham*) and enunciating a clear, workable, standard for the trial courts. This accomplishment goes unrecognized in Petitioner's argument.

defense so strong that only a foolish plaintiff's lawyer takes a case with weak facts to begin with and if they last through summary judgment (which they usually will not), will most likely lose at trial.[7] Right from the beginning of voir dire it is typical for jurors to be asked about their understanding of the difficult job of law enforcement. Thereafter, the jurors' natural inclination to sympathize with the tough circumstances that officers face is reinforced by instructions that officers should not be second guessed and allowance must be made for "split-second decisions." One of the main reasons that *Graham* works is that it truly does provide broad protection for police officers.

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[7] There is another disincentive for counsel to represent a plaintiff in an excessive force case. According to the government, plaintiff cannot recover fees in an excessive force case against federal officials. *Kreines v. United States*, 33 F.3d 1105, 1109 (9th Cir.), *cert. denied*, 513 U.S. 1148 (1995). It is worthwhile to insulate officers so that they are not timid in the performance of their duties, but this Court also needs to consider the reality of what is happening in the courtrooms of America. No counsel can afford to take a case where it is certain that the government will move to dismiss on qualified immunity grounds, then appeal, and even if the case is eventually remanded and won at trial there is no award of fees. This case is a fine example. The video shows a 60-year-old man who quietly took out a banner be grabbed, dragged, and violently shoved into the back of a military vehicle. The government should have apologized and offered him a small sum. Instead the government said we will fight you all the way to the Supreme Court and you will never get paid even if you win. Respondents' counsel has worked for five years out of duty to their clients and because of the gravity of the issues at stake. If the qualified immunity bar is boosted again what counsel is going to even try to clear it?

It is understandable that Petitioner does not discuss the procedural application of *Graham* because when that is done, it is clear that they are asking this Court to fix a non-existent problem at the expense of the Seventh Amendment. Having represented officers as well as plaintiffs, Respondents' counsel is well aware that present instructions enable counsel to encourage the jury in closing to give an officer the benefit of the doubt and a break for an honest mistake – again as it should be.

There is, however, a problem that does need repair. The problem that exists at the trial level is the morass that is created when defense counsel loses, even with all the benefit of the *Graham* instructions, and then tries to get the trial judge to lower the directed verdict standard by using a qualified immunity analysis. *McNair v. Coffey*, 234 F.3d 352 (7th Cir. 2000) (holding that it is error for the trial court to second guess the jury and enter directed verdict based upon qualified immunity). Judge Easterbrook's opinion for the court, decided on December 8, 2000, provides timely, thoughtful, reasoning for this Court to follow. McNair acknowledges that "[f]or many years the analysis of excessive-force claims was beset by legal uncertainty. . . . Uncertainty about the legal standard ended, however, with the Supreme Court's opinion in *Graham*, which adopts an objective approach under the Fourth Amendment. . . . *Graham* makes the norm as clear as the judiciary can achieve. . . . " *McNair*, 234 F.3d at 354.

After recognizing what a fine job *Graham* has done, the court in *McNair* goes on to agree with the Ninth Circuit's decision in this case that "once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion

necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful." *McNair*, 234 F.3d at 355. The court's reasoning in *McNair* follows that of the Ninth Circuit and the majority of other circuits. In application, the qualified immunity reasonableness analysis and the *Graham* reasonableness analysis are not only well reasoned but also practical because they allow *Graham* to continue the job it has done so well facilitating the smooth functioning of the trial courts in excessive force cases.

Retaining the legacy of *Graham* is reason enough to conclude that the two reasonableness inquiries merge; however, there are additional Seventh Amendment limitations that require this result. The Seventh Amendment right to jury trial precludes the argument made by Petitioner that qualified immunity creates a directed verdict at a standard which is lower than that of Rule 50 when a jury has found a violation of the Fourth Amendment. Petitioner refuses to address the ramifications of the legal standard he asks this Court to adopt. Counsel for the Respondents made it clear in their response to Petitioner's Writ for Certiorari that grave Seventh Amendment issues arise from Petitioner's argument. Response to Petitioner's Writ of Certiorari, pg. 4 ("Any outcome that allows the judge to second-guess the jury after it has applied the *Graham* standard is the height of judicial activism and violates the Seventh Amendment"). Nonetheless, Petitioner's brief does not include a single word discussing the Seventh Amendment.

The only instance in which the Petitioner has addressed the issue of how the trial court would need to second guess the jury is in their Reply Brief on Petition

for a Writ of Certiorari. Their response is essentially that the Court's second guessing would be not be different or violate the Seventh Amendment than the Court entering a directed verdict under Rule 50. This response is disingenuous. The evaluation that the court would make for qualified immunity would be different, *and lower*, than the standard that must be met for directed verdict under Rule 50.

Under Rule 50, the court can only direct a verdict if "no reasonable jury could have reached that result." Fed. R. Civ. P. 50.[8] The qualified immunity standard does not require that level of deference to the jury. The Respondents seek to achieve a lower standard for directed verdict by having the trial court review the jury's decision using a qualified immunity analysis instead of the same Fourth Amendment question the jury addressed. Rule 50 only allows the trial court to review the same question that the jury made – using the high deferential standard – and not embark on a different and supposedly more protective inquiry. Directed verdict does implicate the Seventh Amendment and, therefore, has a very high threshold. Any standard below the Rule 50 standard violates the Seventh Amendment.

This is exactly the type of second guessing that Patrick Henry and other anti-federalists insured against by demanding the trial by jury in all trials, including civil

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[8] 9 J. Moore, *Moore's Federal Practice* para. 50.05 (3d ed. 1999).

trials, as part of the quid pro quo for ratifying the constitution.[9] The historical record is clear that the intent of those arguing for an amendment providing for a trial by jury was in large part to insure that a person wronged by a federal official can turn to their peers to decide when there has been an abuse of federal authority. Under the Fourth Amendment, the federal officials have the right to arrest a person and to use force against that person to make the arrest, but the person has the right to call upon their peers, in their state, to decide if the use of force was excessive.[10]

Judges serve the most important role as the guardians of the Constitution, and it is not palaver to say that this case is a prime example. But federal judges are federal officials. They are paid from the federal treasury just like other federal officials. This comment is in no way a disparagement upon the federal judiciary, the federal judiciary has a well-deserved reputation for impartiality, nonetheless, citizens have the right to have their peers decide when federal officials have used excessive force. It is not that federal judges cannot be trusted; it is simply not their role.

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[9] *Galloway v. U.S.*, 319 U.S. 372, 397, (1943) provides some of this history, including the statement by Patrick Henry that " 'trial by jury is the best appendage of freedom. . . . No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed.' " (*emphasis original*, in case, citing Elliott's *Debates*, 324, 544).

[10] As Thomas Jefferson wrote, trial by jury is "one of the fetters against doing evil, which no honest government should decline." *The Letters of Thomas Jefferson: 1743-1826*, to Alexander Donald, Paris, February 7, 1788.

Fortunately it is easy for this Court to decline Petitioner's urging to make a decision that would undermine the Seventh Amendment since *Graham* already works so well. A simple reemphasis of *Graham* along with some guidance on jury instructions will balance the concern that "actions for damages may offer the only realistic avenue for vindication of constitutional guarantees," with the concern that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638.

ARGUMENT

I. *GRAHAM* AND ITS PROGENY WORK WELL SO THERE IS NO REASON FOR THIS COURT TO SUPPLANT *GRAHAM* WITH A NEW, HIGHER, STANDARD OF QUALIFIED IMMUNITY.

A. Development of Fourth Amendment Excessive Force Standard

Prior to 1989, "the analysis of excessive-force claims was beset by legal uncertainty." *McNair v. Coffey*, 234 F.3d at 355. "Some courts analyzed these claims under the fourth amendment, some under the fifth," *Id.* This Court observed that although the Fourth Amendment and Eighth Amendment arguably provided the most textually obvious sources of constitutional protection, most courts followed the holding of Judge Friendly in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), finding that the constitutional protection arose from the substantive due process protections of the Fifth Amendment.

Consistent with this underlying source of the right, liability arose where the officer's use of force "shocked the conscience." *Graham*, 490 U.S. at 393. In addition to the uncertainty as to the underlying source of the protection, the "conscience-shocking" conduct standard proved to be "very hard to pin down in practice." *McNair*, 234 F.3d at 355.

This uncertainty was removed by this Court through the decision in *Graham v. Connor*, 490 U.S. 386, 393 (1989). *Graham* held that for free citizens (as compared to prisoners), whatever the setting, the right against use of excessive force by government officials derived from the Fourth Amendment and must be assessed under an objective reasonableness standard. *Id.* at 395 ("Today we . . . hold that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard.")

In *Graham*, as here, the defendant claimed the plaintiff suffered no discernable injury. In *Graham*, a diabetic man felt the onset of an insulin reaction (falling blood sugar) and wanted to purchase orange juice. *Graham v. Connor*, 490 U.S. at 388. Upon entering the convenience store and seeing a number of people ahead of him in line, he hurried out of the store and returned to his friend's automobile and asked to be driven to a friend's house. An officer who saw the hasty exit from the store, stopped the car, handcuffed the diabetic man, put him face down on the hood of the car and then threw him face first into a police car. After receiving a report that the man had done nothing wrong at the store, he was driven home and

released. He subsequently sued for violation of his rights under the Fourth Amendment. At the close of the evidence, the trial court granted a directed verdict finding that the amount of force used was appropriate, did not inflict any discernable injury and was not applied maliciously or sadistically. *Id.*, at 390-91.

Chief Justice Rehnquist, writing for a unanimous Court reversed, holding that claims of excessive force must be decided under an objective reasonableness standard under the Fourth Amendment. *Id.* at 395. Further, the Court provided a detailed discussion further clearly establishing the law for applying the objective reasonableness standard. The Court held that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396.

Further, the Court emphasized that the "reasonableness of a particular use of force must be judged from the *perspective of a reasonable officer on the scene*, rather than with the 20/20 vision of hindsight." *Id.* at 396 (emphasis supplied). Further, "the same standard of *reasonableness at the moment applies*: Not every push or shove, even if it may later seem unnecessary in the peace of the judge's chambers violates the fourth amendment." *Id.* (emphasis supplied). Finally, the Court held that "the calculus of reasonableness must embody allowance for the fact that

police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.*

The Court ended this section of the decision by emphasizing that the " 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. Because the trial court and the Court of Appeals applied a subjective standard, the directed verdict in favor of the officer was reversed and the matter was remanded.

Following *Graham*, lower courts have enriched this understanding by rulings in various factual permutations which make clear that the Fourth Amendment provides officers with wide latitude to determine the amount of force that is reasonably necessary. *See Forrett v. Richardson*, 112 F.3d 416, 420-21 (9th Cir. 1997), *cert. denied*, 523 U.S. 1049 (1998) (shooting violent felony suspect was reasonable even if his capture through other means was inevitable); *Scott v. Henrich*, 39 F.3d at 915 (reasonable to shoot armed man who confronted police at door); *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994) (fatal shooting of emotionally disturbed suspect was reasonable); *Placas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994) (shooting of suspect was reasonable; officers not required to use available alternatives of maintaining distance from suspect with protection of barrier, or using chemical spray).

By stressing the wide latitude and the viewpoint of the objectively reasonable officer on the scene, the standard on the merits provides the same protection as qualified immunity for the innocently mistaken officer who must make split-second judgments in the field and permits a wide choice of force alternatives to accomplish the needed task of apprehending an individual.

It is helpful to apply *Graham* and the combination of cases discussed above to the facts of the case at hand. There is a video in this case that shows Dr. Katz being given an unnecessary, violent, shove into the back of a military vehicle. Saucier claims that the shove was necessary because Dr. Katz was resisting being placed into the vehicle. Dr. Katz disputes the claim that he was resisting and said that he did not resist.[11] This disputed fact

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[11] Petitioner admitted in his Reply Brief for the Petitioner on Petition for a Writ of Certiorari that "respondent points out that he denied resisting arrest or pushing off the bumper with his feet. See *ibid.* We do not (for present purposes) contend otherwise" pg. 3, fn. 1. Perhaps realizing that this unquestionably raises a question of fact that must be resolved by the jury regardless of what standard is applied, Petitioner later tries to claim in the opening brief that it is enough that Dr. Katz placed his foot on the bumper for Saucier to have reasonably believed that he was going to resist (even if he wasn't) thereby making the violent shove reasonable as a matter of law. Immunity based upon such a tenuous connection would make a mockery of the Fourth Amendment. Fortunately the video shows that Dr. Katz was not resisting. And common sense supports such a conclusion. A 60-year-old man with a fractured foot wearing a splint instead of a shoe is unlikely to be resisting by pushing off a back bumper with his feet – but this is for a jury to decide. Any jury will see the shove for what it was – a gratuitous act to give him one for good measure – the type of act that the Fourth Amendment protects against.

insures that regardless of the legal standard that this Court applies, this case will return to the trial court for a decision by the jury about whether Dr. Katz was resisting. And if they find that he was resisting and pushing off the vehicle, despite his testimony and the video showing that did not happen, then they will find that the officers did act in an objectively reasonable manner – as they should under the *Graham* factor that considers whether the suspect "is actively resisting arrest or attempting to evade arrest by flight." *Graham*, U.S. 490 at 396. If, however, the jury finds that Dr. Katz did not resist, then they will find that reasonable officers would not have given the violent shove.

Although they do not exist in this case, there are many scenarios in which this Court's guidance in *Graham* will lead to summary judgment. Let us change the facts for illustration. For instance, assuming that the video showed that Dr. Katz was actively resisting and pushing off the bumper with his feet, the trial court could enter summary judgment for the officers based upon a finding that reasonable officers could believe they could use force to overcome the resistence and enable them to put him into the vehicle. This may also be the case if there were no video, but there were a dozen declarations from impartial citizens who saw the incident all saying that Dr. Katz was resisting being placed in the vehicle. Of course there is not even one such declaration in this case because it did not happen. Nonetheless, it does illustrate how a change in the facts would allow a trial court to end the case quickly at summary judgment.

B. Development of Objective Reasonableness Standard for Qualified Immunity

Prior to the decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982), decisions on qualified immunity applied a subjective good faith standard. *Harlow* adopted a solely objective legal reasonableness standard to evaluate qualified immunity. *Harlow*, supra, 510 U.S. at 818. *Harlow* found that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should . . . permit resolution of many insubstantial claims on summary judgment." *Id.* "On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Id.* "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct" *Id.* at 818-819. Only if the official can establish "extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, [can] the defense be maintained." *Id.* at 819.

Harlow was careful to underscore that this test should not be read in such a way that it would provide a "license for lawless conduct." *Id.* And that "the public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts." *Id.* "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Id.*

The Court reemphasized the objectiveness of the qualified immunity inquiry in *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("qualified immunity . . . turns on the 'objective legal reasonableness' of the action."). *Anderson*, a case involving whether the law enforcement officers had probable cause, refined the standard, allowing for occasions where an abstract right such as due process is well established, but where the abstract right is not sufficient to allow "officials to reasonably . . . anticipate when their conduct may give rise to liability for damages." Applying this "abstract right" exception or refinement of *Harlow* to the question of a warrantless search conducted based on probable cause and exigent circumstances, the Court found that because of the complex legal issues involved in probable cause, "We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present." *Id.* at 641.

C. The Standard For Determining Liability and The Standard For Determining Qualified Immunity Converge In A Fourth Amendment Claim For Excessive Use of Force.

In *Graham*, which was decided after *Anderson*, the Court expressly left open the question of the application of qualified immunity to an excessive force case given the careful articulation of the legal standard in *Graham*, 490 U.S. at 390 n. 12. Nonetheless, the same broad protection and wide latitude provided for the law enforcement officer by *Graham*, on the merits, as by *Anderson*, on qualified immunity, as well as the emphasis under both standards

of the "objective reasonableness" of the force used, compels the conclusion that the standards, if not precisely the same in theory, are the same in application.

While there is disagreement among the circuits on this question, the Ninth Circuit and the majority of the other circuits have held that these standards have merged or become the same in application in all but extraordinary cases. *See LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000) (test for qualified immunity in excessive force cases is the same as the test on the merits); *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159, 132 L. Ed. 2d 855, 115 S. Ct. 2612 (1995); *Napier v. Town of Windham*, 187 F.3d 177, 183 (1st Cir. 1999) (qualified immunity and excessive force standard are similar inquiries); *Roy v. Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) ("In theory, substantive liability and qualified immunity are two separate questions . . . In police misconduct cases, however, the Supreme Court has used the same 'objectively reasonable' standard in describing both the constitutional test for liability [citing *Graham*] and the Court's own standard for qualified immunity [citing *Anderson*]."); *Finnegan v. Fountain*, 915 F.2d 817, 824 n.11 (2d Cir. 1990); *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) ("The immunity test and the test on the merits both rely on an objective appraisal of the reasonableness of the force employed."); *Jackson v. Hoylman*, 933 F.2d 401, 402 (6th Cir. 1991) ("qualified immunity turns on the same objective reasonableness standard that the claim of excessive force turns on."); *McNair v. Coffey*, 234 F.3d 332 (7th Cir. 2000) (once jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for

immunity purposes whether a reasonable officer could have believed that his conduct was lawful"); *Frazell v. Flanagan*, 102 F.3d 877 (7th Cir. 1966); *Guffey v. Wyatt*, 18 F.3d 869, 873 (10th Cir. 1994) ("If a plaintiff alleges a police officer has used excessive force in violation of the Fourth Amendment, the qualified immunity inquiry becomes indistinguishable from the merits of the underlying action."); *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991) ("when jury . . . decided that the force used by the officer was unreasonable under all the circumstances . . . no officer could reasonably believe that the use of unreasonable force did not violate clearly established law."); *Scott v. District of Columbia*, 101 F.3d 748, 759 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1231 (1997) ("the issue of whether an officer used excessive force and whether he is entitled to qualified immunity are both determined according to a single standard").[12]

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[12] Contrary to Petitioner's argument, few cases have found that the force used was unreasonable under *Graham* and the Fourth Amendment, but not "reasonably known to be unreasonable" under *Anderson* and qualified immunity. Contrary to the suggestion by Petitioner, the cases collected in footnote 12 of Petitioner's brief are not examples of a court making such a finding "reasonably unreasonable" force. For example, in *Napier v. Town of Windham*, 187 F.3d 177, 182-83 (1st Cir. 1999), the court held that "[u]nfortunately for clarity's sake, the 'objective reasonableness' of the officer's conduct is crucial to both the qualified immunity and the substantive liability inquiries." *Id.* at 182. The court went on to say that as a result of the similar inquiries, the determination that the police officer's conduct was objectively unreasonable could have been a grant of summary judgment on either qualified immunity or substantive Fourth Amendment grounds. *Id.* at 183. In *Finnegan v. Fountain*, 915 F.2d 817, 824 (2d Cir. 1990), not only did the

The convergence of these standards is not the result of an accidental use of the same terminology, it is because *Graham*'s standard on the merits provides the same broad protection for error afforded a law enforcement officer under the doctrine of qualified immunity, and because under both standards the same facts are viewed from the same perspective (the objectively reasonable officer) and assessed with an equivalent measure of what level of force is legally excessive ("reasonable" and "reasonably known to be reasonable").

As discussed above, *Graham* not only clarified the previously uncertain standard for assessing a claim of excessive force, it set forth in detail the particular protections and the wide latitude that must be extended to the law enforcement officer. *Graham*, 490 U.S. at 396. The force must be assessed from the officer's perspective. It must be assessed at the moment the decision to use the force is made. It must take into consideration the severity

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court not present an example of "reasonably unreasonable" force, but it noted the unlikelihood of such a possibility. *Id.*, at 824 n.11. Likewise, in *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) the court not only did not make a finding of "reasonably unreasonable" force, but emphasized that qualified immunity and the merits "both involve the objective appraisal of the reasonableness of the force employed." *Id.* Neither of the cases cited from the Seventh Circuit made a finding of "reasonably unreasonable" conduct. Moreover, Judge Easterbrook has most recently eloquently expressed why no qualified immunity defense is applicable to a claim of excessive force. *McNair v. Coffey*, 234 F.3d 352 (7th Cir. 2000). The Eighth Circuit decision in *Landrum v. Moats*, 576 F.2d 1320, *cert. denied*, 439 U.S. 912 (1978) was decided before *Graham* and necessarily cannot involve a finding of "reasonably unreasonable" force.

of the crime, whether the plaintiff is resisting arrest or attempting to flee. It must be mindful that every push and shove is not a violation of the Fourth Amendment, even if it is later viewed as unnecessary. *Id.* Through these protections, and the detailed articulation of the standard, *Graham* accomplishes the goal of the qualified immunity doctrine.

Not only does *Graham* already provide wide latitude and a substantial margin for error on the part of the officers, the standards are in concept and application the same. In both assessing the merits of an excessive force claim and in assessing qualified immunity, the trier of fact must examine the facts from the perspective of the hypothetical "objectively reasonable officer," at the time of, and under the pressures of the moment just before the force is used. *Graham v. Connor,* 490 U.S at 396 (reasonableness "judged from perspective of a reasonable officer on the scene, . . . at that moment"); *Anderson v. Creighton,* at 639 ("whether an official [is] protected by qualified immunity . . . generally turns on the objective legal reasonableness of the action").

For both inquiries, courts have emphasized the "objective" nature of the standard. What this particular officer felt, knew, or believed is not relevant. The trier of fact must examine the use of force through the lens of the legal fictional character, the "objectively reasonable officer." The result is that in practice the objectively reasonable officer is the same for both Fourth Amendment and qualified immunity. To the extent there is a minuscule difference, one of semantics, it is necessarily confusing to

both judges and juries and is an inappropriate distinction for two sets of jury instructions.[13]

Petitioner incorrectly relies upon *Anderson* for the claim that *Graham*'s objective reasonableness standard is so different from the qualified immunity standard that the trial court may second guess the jury after its verdict. *Anderson* did conclude that in probable cause cases the objective reasonableness standard is different between

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[13] Instead of the confusing instructions that would result from the incomprehensible distinctions proposed by Petitioner, Respondents suggest that the following jury instructions could be included as more particularly instructing on the standard set forth by *Graham*.

1. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, at the moment of the decision to use the force, rather than with the 20/20 vision of hindsight. In reaching your decision, you shall allow for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. at 396.

2. In considering whether a law enforcement officer used excessive force, you shall consider the severity of the crime and whether the defendant actively resisted arrest or attempted to evade arrest by flight. The officer is not obligated to use the minimum amount of force necessary. Not every push or shove even if it may later seem unnecessary in the peace of the courtroom violates the Fourth Amendment.

Graham v. Connor, 490 U.S. at 396.

3. In considering whether a law enforcement officer used excessive force, you shall give ample room for mistaken judgments.

Graham v. Connor, 490 U.S. at 396.

the Fourth Amendment and qualified immunity. Excessive force, however is different for two reasons. First, *Graham*, which came after *Anderson*, took care in defining use of force in objectively reasonable terms. Second, the *Graham* standard is well settled compared with probable cause, which is often in a state of flux.

The particular area addressed in *Anderson* was a warrantless search based on probable cause and exigent circumstances. *Id.* at 637. Because this right arises out of the Fourth Amendment, as does a claim against excessive force, Petitioner attempts to argue that *Anderson* is applicable to the instant case. This fails to recognize the substantial differences between the issue of probable cause and excessive force. "Even learned and experienced jurists have had difficulty in defining the rules that govern probable cause." *Bivens v. Six Unknown Agents*, 456 F.2d 1339, 1348 (2d Cir. 1972) (on remand from Supreme Court). This is because the determination of probable cause involves the legal standards for the underlying crime, which is often evolving. The Amicus Brief by the ACLU provides an excellent example of the developing and uncertain nature of law underlying a determination of probable cause, in its discussion of the jurisprudence concerning investigatory stops or arrests based on information provided by informants. Such legal uncertainty explains and underscores the need for the qualified immunity doctrine in the area of probable cause. No such developing legal doctrine exists in the area of the amount of force necessary to make an arrest. *Graham* not only

established the general standard for such a determination, but provided ample detail for its application in particular situations.

These differences between probable cause and excessive force cases have been recognized by the lower federal courts. *See e.g. Humphrey v. Staszak,* 148 F.3d 719 (7th Cir. 1998); *Alexander v. County of Los Angeles,* 64 F.3d 1315, 1322 (9th Cir. 1995); *Street v. Parham,* 929 F.2d 537, 541 n.2 (10th Cir. 1991) (because of the difficulties of deciding the probable cause issue, the conduct of the officer may be objectively reasonable even if cause did not exist, but in "excessive force cases, once a fact-finder has determined that the force used was unnecessary. . . . Any question of objective reasonableness [is] . . . foreclosed."); *Landy v. Irizarry,* 884 F. Supp. 788, 801 n.18 (S.D.N.Y. 1994).

One court described this distinction as one of *ex post* inquiry and *ex ante* inquiry. *Finnegan v. Fountain,* 915 F.2d 817, 824 n.11 (2d Cir. 1990). In *Finnegan,* the second circuit held that the determination of qualified immunity and reasonable use of force to both be *ex ante* inquiries, made from the perspective of the officer at the moment the decision to use force is made. In contrast, the probable cause inquiry is a *ex post* inquiry judging reasonableness from the actual circumstances as determined as a matter of fact. These cases show that the differences between probable cause and excessive force justify *Anderson,* but no expansion of it. Besides, to the extent that any expansion of *Anderson* into excessive force is necessary, *Graham* more than covers it.

It is apparent that Judge Easterbrook was aware that *certiorari* had been granted in this case when he authored

the court's opinion in *McNair v. Coffey*, 234 F.3d 352, 355 (7th Cir. 2000).[14] It should not be forgotten that qualified immunity is made out of judicial cloth. Every stitch to create it is a stitch unraveled from the Fourth Amendment. The history that "until this century police faced absolute liability (in trespass and battery) for their acts; probable cause and reasonableness were defenses, and immunity (on top of these defenses) was unheard of," *Id.* at 356, is significant. Unnecessary expansion of immunity should be avoided by this Court.

As the court further states in *McNair*, "[a]ll the great early opinions defining the scope of freedom from official intrusion resolve damages claims, without a hint that if the official behaved unreasonably they might still be immune from liability." For these reasons, he concludes that "a general doctrine of official immunity, independent of legal uncertainty, is not only anti-textual but also anti-historical in fourth amendment cases."[15] *Id.* More good

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[14] The court in *McNair* specifically cited and followed this case now before the Court while commenting that its resolution may soon provide guidance to the circuits. *McNair*, 234 F.3d at 355. ("The Supreme Court may resolve this conflict in *Saucier*; unless superseded by higher authority, however, the position articulated in *Frazell*" [agreeing with the Ninth Circuit position] prevails in this circuit.)

[15] Here there is specific language in the text of the Constitution that applies. The Seventh Amendment states, "No fact tried by a jury shall be otherwise re-examined in any Court of the United States. . . . " U.S. CONST. AMEND. VII. This prohibition against second guessing is at the core of the Seventh Amendment. A *textual* interpretation of the Seventh Amendment clearly prohibits second guessing – even for purposes of qualified immunity. The meaning of the text should

reasons to let *Graham* continue doing the job it does so well.

II. THE SEVENTH AMENDMENT PRECLUDES THE JUDGE FROM ENTERING A DIRECTED VERDICT BASED ON QUALIFIED IMMUNITY AFTER THE JURY HAS FOUND A VIOLATION OF THE FOURTH AMENDMENT IN AN EXCESSIVE FORCE CASE

A. The History of the Seventh Amendment Shows that it is a Fundamental Right That Has Been "Jealously Guarded" by this Court

For the reasons previously set forth, *Graham* works perfectly well and the Court may decide, in accordance with the majority of circuits, that the Fourth Amendment and qualified immunity analysis is either identical or merge at the time of trial. Should this Court, however, consider the possibility of deciding that the reasonableness inquiry for a Fourth Amendment excessive force

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guide this Court. As Justice Scalia has written in *A Matter of Interpretation, Federal Courts and the Law* 38 (1997) "[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." The original meaning, no second guessing by the court, is clear from the text. This case lies right at the crux of the social contract, of which the Seventh Amendment is a part, between federal government officials and those they govern. It is here that a written Bill of Rights shows its brilliance as the touchstone of the rule of law. In the case at hand, when the federal government seeks to have federal judges provide greater insulation for federal officials, it is the text of the Amendment itself, and this Court's steadfast dedication to it, that requires the government's entreaty to be denied.

case and for qualified immunity are not identical, do not merge, and that qualified immunity raises the bar of protection for police officers above a finding that the Fourth Amendment has been violated, then the Court should consider the limits the Seventh Amendment places on such a decision.

Petitioner refuses to address the ramifications of the legal standards that they ask this Court to adopt. Counsel for the Respondents made it clear in their response to Petitioner's Writ for Certiorari that grave Seventh Amendment issues arise from Petitioner's argument. Response to Petitioner's Writ of Certiorari, pg. 4 ("Any outcome that allows the judge to second guess the jury after it has applied the *Graham* standard is the height of judicial activism and violates the Seventh Amendment"). Nonetheless, Petitioner's brief does not include a single word discussing the Seventh Amendment.

Fortunately, this Court does not turn a deaf ear to the mandate of the Seventh Amendment. As Chief Justice Rehnquist wrote in his dissenting opinion in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 352 (1978), "[t]he right of jury trial in civil cases at common-law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." (Quoting *Jacob v. New York*, 315 U.S. 752, 753 (1942)). Jealously guarding the Seventh Amendment right to jury has long been the practice of this Court. *Balis v. Travelers' Ins. Co.*,

113 U.S. 316, 321 (1885) ("This constitutional right [Seventh Amendment] this court has always guarded with jealousy").

There is good reason to squarely address the Seventh Amendment issue in this case. The unarticulated erosion of the Seventh Amendment proposed by the government's legal standard is exactly the type of gradual erosion that Justice Black warned about over 58 years ago when he lamented the "gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway v. United States*, 319 U.S. 372, 397 (1943) (dissenting opinion). If the reasonableness standard for qualified immunity provides for greater insulation from liability than the reasonableness standard in *Graham* for the Fourth Amendment, and the decision of qualified immunity is made by the judge, then the judge is second-guessing the jury in violation of the Seventh Amendment.

A historical review of the original intent of the Seventh Amendment shows clearly that this type of second-guessing by judges was exactly what the Amendment was intended to prohibit.[16] As Justice Rehnquist explains

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[16] Professor Jack N. Rakove, in his book *Original Meanings: Politics and Ideas in the Making of the Constitution*, Chapter X, "Rights," pages 297-302 provides an insightful history of sentiment regarding the right to jury trial at the time of the preparation of the Constitution and Bill of Rights. As he sums up before the discussion, "[a]t the outset Americans believed that arbitrary acts of the Crown and its colonial officials, including judges of the higher courts, posed the greatest threat, and they accordingly treated the rights of representation and

in *Parklane*, the historic roots of the Seventh Amendment run deep. "It is perhaps easy to forget, now more than 200 years removed from the events, that the right of trial by jury was held in such esteem by the colonists that its deprivation of the hands of the English was one of the important grievances leading to the break with England."[17] He goes on further to point out that the denial of "the right of jury trial was listed among the specific offensive English acts denounced in the Declaration of Independence."[18]

Justice Rehnquist further explains how the popular demand for a right to jury trial in both criminal and civil cases did not end with the Declaration of Independence, but continued on after the constitutional convention.[19] As he sums up, " . . . the price exacted in many states for

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trial by jury as their chief securities against arbitrary rule." *Id.* at 289-290.

[17] Citing S. Morison, *Sources and Documents Illustrating the American Revolution 1764-1788 and the Formation of the Federal Constitution* 94 (2d ed.-1929); R. Pound, *The Development of Constitutional Guarantees of Liberty* 69-72 (1957); *The Vice-Admiralty Courts and the American Revolution* 208-211 (1960).

[18] *Parklane, supra,* 340. Citing the language in the Declaration which states: "for depriving us in many cases, of the benefits of Trial by Jury." He further cites the First Continental Congress which unanimously decided that the colonies were entitled to "the great and inestimable privilege of being tried by their peers." 1 *Journals of the Continental Congress* 69 (1904). This idea that one could turn to their peers to check the excesses of government officials is a thread that runs throughout the demand for the creation of the Seventh Amendment and is central to this case.

[19] *Parklane*, 439 U.S. at 342.

approval of the Constitution was the attending heavy list of recommended amendments, chief among them a clause securing the right to jury trial in civil cases."[20]

The circuit courts have shared this appreciation and reverence for trial by jury. As the court pointed out in *Melear v. Spears*, 862 F.2d 1177, 1178 (5th Cir. 1989) "Montesquieu once predicted the demise of the English system of liberty by comparing England and once-powerful ancient cultures. In the commentaries, Blackstone chose an apparently mundane basis for rebuttal, contending that Montesquieu 'should have recollected that Rome, Sparta and Carthage, were strangers to trial by jury.' *Id.* We likewise revere the jury's function, just as we revere the right to the jury trial that Aviett exercised."

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[20] *Id.* This historical analysis is supported by Supreme Court precedent closer to the time of the formation of the Bill of Rights. For instance, in *Parsons v. Bedford et al.*, 28 U.S. 433, 446, (1830) the Court summarized: "one of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by the Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

B. Lower courts have correctly recognized that the Seventh Amendment prohibits a judge from directing a verdict based upon qualified immunity after the jury has found a Fourth Amendment violation.

In *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000), the court held that the trial court cannot make determinations of fact because to do so would violate the Seventh Amendment. *Id.* at 954 ("[W]here there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand and a material issue of fact, the Seventh Amendment, require submission to a jury." *Id. citing Thompson v. Mahre*, 110 F.3d 716, 719 (9th Cir. 1997)).

In *Brisk v. City of Miami Beach*, 726 F. Supp. 1305 (S.D. Fla. 1989), the court provided a thoughtful analysis of the Seventh Amendment limitiations upon a court using qualified immunity to grant a directed verdict after there has been a jury verdict. The court concluded that such an act would violate the Seventh Amendment stating:

> Similarly, if the Court were to have determined that excessive force was in fact applied, but that an officer in the position of a later-arriving defendant could have believed that the amount of force used was necessary under the circumstances, then the Court would have granted a motion for directed verdict based on qualified immunity. Granting a directed verdict under these circumstances would have deprived Plaintiff of his right to have a jury decide exactly what occurred during the incident in question.

(citing *Melear v. Spears*, 862 F.2d 1177, 1188 (5th Cir. 1989)). *Id.* at 1313.

This type of second guessing by the trial judge after a jury verdict is exactly what the defendants are trying to get this Court to approve – although they never come out and say it. Despite all of the discussion below and direct references in the Response to Request for Certiorari about how the government's proposed standard is supposed to work, they never provide an explanation to this Court. It is understandable why the government avoids this issue – their proposed standard is absolutely unworkable without violating the Seventh Amendment. Though the government does not admit it, here is what is happening: the practical result of their proposed new standard is to lower the threshold for directed verdict and allow the trial judge to second guess the jury without meeting the requirements of a Rule 50 directed verdict. Basically their proposal is that the trial judge can say to the jury "thank you ladies and gentlemen for taking time from your busy lives and fulfilling the important role that our founders preserved for you in the Seventh Amendment. You can go home now and I'll consider the same evidence and decide again."

Although the government does not discuss directed verdict in its brief, their argumentative heading makes it clear that their position requires the judge to make a determination after the jury. It reads:

AN OFFICER WHO USES FORCE THAT IS ULTIMATELY FOUND UNREASONABLE UNDER THE FOURTH AMENDMENT MAY NEVERTHELESS BE ENTITLED TO QUALIFIED IMMUNITY

What is clear from this heading is that, according to the government, qualified immunity is available **after** the jury has reached its verdict. Since this Court has stated that qualified immunity is to be decided by the judge, *Hunter v. Bryant*, 502 U.S. 224, 228 (1991), the result is a post trial directed verdict motion after the jury has decided.

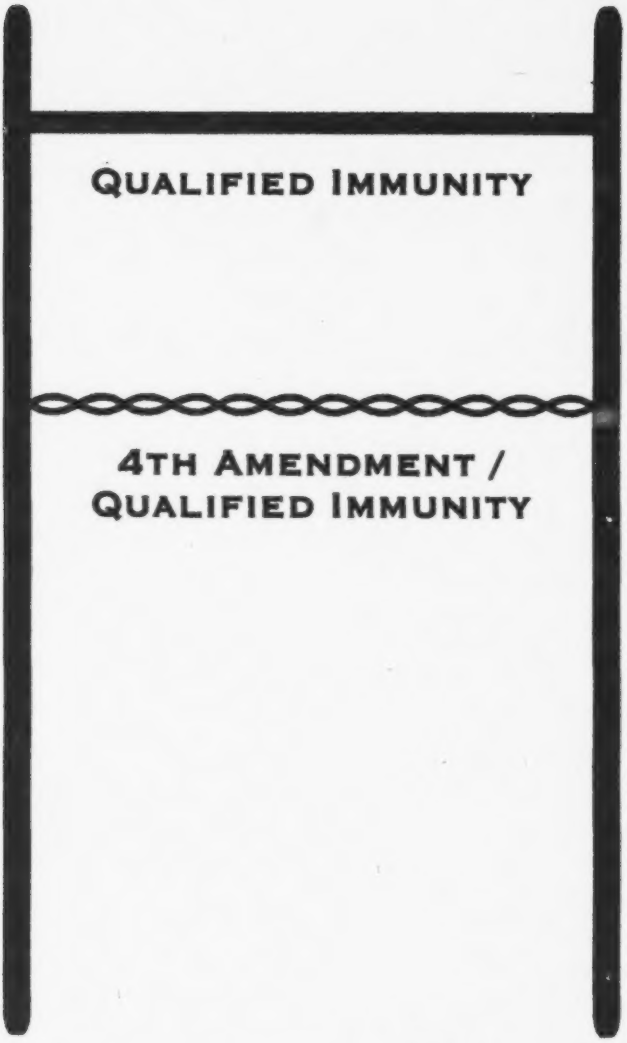
The court in *Brisk* specifically addressed the shortcomings of this argument.

> Moreover, it would be anomalous to have a court deny summary judgment because of disputed factual issues and then grant a directed verdict at trial when these same factual issues remain in dispute and when there is sufficient evidence in the record to allow a jury to find for either party as to those issues. A court adhering to this procedure would in effect be saying that, though the Federal Rules of Civil Procedure at Rule 56 precludes the weighing of evidence at the summary judgment stage, the Federal Rules of Civil Procedure, Rule 50 does not preclude the weighing of evidence when ruling on a directed verdict motion at trial. This view is clearly an incorrect application of both the Federal Rules of Civil Procedure and the standard for reviewing directed verdict motions. A directed verdict is appropriate when there can be but one reasonable conclusion as to the verdict . . . (*Anderson* does not create exception to deferential standard of review applicable to j.n.o.v. motions). It is therefore not this Court's role to deviate from the usual standard of review applicable to directed verdict motions. When disputed facts material to the qualified immunity issue exist and reasonable jurors

> could reach differing conclusions regarding those facts, it is inappropriate for the district court to grant a directed verdict based on qualified immunity. *Brisk*, 726 F. Supp. at 1313.

See, *Halperin v. Kissinger*, 807 F.2d 180, 189 (D.C. Cir. 1986) (J. Scalia, sitting by designation).

While the following diagram is somewhat simplistic, it accurately depicts the impact on the Seventh Amendment of inappropriately allowing the judge to second guess the jury through a lowered standard for directed verdict.



The lower bar can represent either a goal post or a high jump depending on one's sporting preference – the important point is that the plaintiff must clear it. As can be seen, the lower bar is thicker and is intertwined with the two reasonableness decisions of *Graham* and qualified immunity. As discussed earlier in this brief, based upon the Ninth Circuit analysis, and the majority of other circuits, once a plaintiff clears this, then the decision has

been made by the jury and there is no second guessing by the court. The second, higher, bar represents the proposed threshold the government suggests must be cleared in order to overcome qualified immunity when there has been a finding of an unreasonable use of force. Since the only way to clear the higher bar is to convince the judge, the space between the higher bar and the lower bar represents the realm of directed verdict based on qualified immunity in violation of the Seventh Amendment.

The case of *McNair v. Coffey*, No. 00-1139, 2000 WL 1801253 (7th Cir. Dec. 8, 2000) is an example of what happens when the second, higher, bar is added. In *McNair*, the defendant moved for directed verdict and asked the trial judge to second guess the jury's decision and grant a directed verdict based upon qualified immunity. The trial court entered the directed verdict. Reversing, the court in *McNair* commented on the role of the trial judge. "He [the defendant] did not move for judgment under Fed. R. Civ. P. 50 either at the close of the evidence or after the verdict. Instead he accepted the jury's conclusion that the conduct violated the Fourth Amendment and argued that, even so, he is entitled to qualified immunity from civil liability. With this contention the district court agreed, setting aside the verdict and entering judgment for Coffey." The court of appeals then reversed the trial court. While the Seventh Amendment is not directly referred to, it is clear from the court's opinion that part of the error was the trial court's second guessing of the jury.

The government's indirect move to dramatically increase the role of the trial court and displace the jury in contravention of the Seventh Amendment is contrary to

the open eye and ready ear this Court has kept to prevent the erosion of the Seventh Amendment. Having thought a moment about the mechanics of boosting the qualified immunity defense and the ramifications of such a step, this Court should also ask, why boost the defense anyway? Is it needed? The answer is definitely "NO." As previously discussed, ***Graham* works perfectly well** – it was and remains an excellent decision that provides officers with ample protection.

One of the main reasons *Graham* works so well is that it took a mish-mash of conflicting cases, some of which applied an objective test for excessive force and some of which applied a subjective test and set down a simple, workable, standard: "would the objectively reasonable officer have used the amount of force applied"? *Graham* at 397. Part of the beauty of such clean judicial reasoning is that it allows for understandable jury instructions. Trial courts throughout America that are finding that the two reasonableness inquiries are identical or merge are doing so not only because it is sound judicial reasoning and respectful of the Seventh Amendment, but also simply because *Graham* instructions work so well.

The simple fact is that due to Seventh Amendment constraints, the only way to heighten insulation for officers above *Graham* is through jury instructions. If this Court wants to raise the bar in the diagram above *Graham*, which is totally unnecessary and would only create confusion in an important area of law that will be completely settled once this immunity issue is resolved, then the Court has two choices: One, revisit *Graham*, start over, and create another standard higher than objective reasonableness. Two, give the question of qualified

immunity to jurors so that they receive a set of two hopelessly confusing jury instructions.

It is at this juncture that the government's argument loses touch with reality. As with other practical ramifications, the government never talks about the instructions that would result if this Court were to adopt its higher bar and give an additional instruction to the jury. While the government's counsel is certainly highly skilled and their brief is well written, no thought seems to have been given to what it is like to instruct the jury to first decide whether the officer has acted in an "objectively reasonable" manner and then, assuming that the jury finds that the officer acted unreasonably, to decide whether the officer "reasonably acted unreasonably," so they are entitled to qualified immunity.[21]

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[21] Another example of a somewhat disingenuous characterization is the claim that "the Ninth Circuit has effectively held that, in cases like this, officers are prohibited from using *any force at all* to make an arrest." (emphasis original, Brief for the Petitioner, page 43). Of course, the Ninth Circuit never held any such thing, nor has Respondent made that argument. Officers can use force under the Fourth Amendment. The question is whether that use of force was objectively reasonable. The same is true of Petitioner's argument that there must be a serious physical injury for there to be violation of the Fourth Amendment. Fourth Amendment rights do not turn on whether the officer hits someone in the stomach which may not cause a lasting injury instead of hitting them in the face which may. The Fourth Amendment is intended to protect against oppression. *Soldal v. Cook County*, 506 U.S. 56, 113 S.Ct. 538 (1992). Oppression does not always leave a lasting physical injury. Besides, this Court has held that physical injury is not necessary to prove the violation of a constitutional right. *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (law is well settled that a

It helps to have been before the trial judge when these instructions were discussed (as have respondents' counsel representing both officers and plaintiffs including a recent trial where this very issue was discussed at length), to realize how ludicrous they are. It really is demeaning to the entire judicial system to ask jurors to dance on the head of a pin like this. They think, and rightfully so, that the whole system is unreasonable. This Court has many roles, and preserving the integrity of the courts is one of them. If the Court concludes that it really does want to expand police protections beyond what *Graham* provides, then it should do so directly with a new Fourth Amendment standard rather than a back door boost of the bar with qualified immunity which either violates the Seventh Amendment because the judge makes the decision or hopelessly confuses the jurors because they consider two separate obtuse jury instructions.

The case at hand makes for an excellent example. Regardless of how this Court decides, this case will return to the district court for trial.[22] Mr. Saucier testified that Dr. Katz resisted being put into the van by pushing

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plaintiff may recover nominal damages without proof of actual injury for unreasonable intrusions on one's bodily integrity).

[22] Petitioner essentially admits this in his brief at page 41 when he states "if there were a fact dispute concerning whether or not an officer gratuitously struck a complaint suspect with a truncheon, qualified immunity would be inappropriate, and obviously so; any belief that the Fourth Amendment permits such undue violence would be patently unreasonable." Similarly, if Dr. Katz was not resisting, the undue violent shove he was subjected to "would be patently unreasonable."

off the rear bumper to prevent being put inside. Dr. Katz testified that he had a fractured foot, that his foot was in a splint without a shoe, and that he did not resist being put in the van by pushing off the rear bumper. The video tape of the incident confirms Dr. Katz's testimony in that there is coverage at the exact moment he is violently shoved into the van and it does not show any resistence on his part. So there is a question of fact: was Dr. Katz resisting, thereby justifying the violent shove? Of course this is the type of decision that our system leaves squarely in the hands of the jury.

Petitioners may later suggest that jurors make specific findings and then the trial court can take these findings and decide qualified immunity. This proposal is unworkable. What findings would be given to the jury? That Dr. Katz pushed off the bumper, if so how hard did he push off? How long did he push off? Jurors would be left flabbergasted and feeling like they are playing second fiddle – even worse, the judge would invariably fill in the facts that the Seventh Amendment requires the jury to make. Such mixed fact finding violates the Seventh Amendment. *Hodges v. Easton*, 106 U.S. 408, 412 (1882) ("The court could not, consistently with the Constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury.") Many excessive force cases have complicated and hotly contested facts; such an approach would be both unworkable and a disingenuous way to let the judge decide the facts.[23]

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[23] It would be impossible to decide what specific findings should be made by the jury. A few of the questions that may be

Circuit courts have recognized that at times "[t]he legal question of immunity is completely dependent upon which view of the facts is accepted by the jury." *Adams v. Metiva*, 31 F.3d 375, 387 (6th Cir. 1994). In such a case, the "jury becomes the final arbiter of the claim of immunity." *Id.*; *Mahoney v. Kesery*, 976 F.2d 1054, 1058-59 (7th Cir. 1992). This course, using the *Graham* jury instructions discussed earlier, is a better course than the use of special interrogatories.

Assuming that jurors will decide not only whether Dr. Katz pushed off, but also whether the officers used objectively reasonable force, the real question is what instructions will be given to the jury after they have heard the conflicting testimony from Mr. Saucier and Dr. Katz? Using *Graham*, they should be given instructions similar to those proposed earlier in this brief. As Judge Jensen, himself a seasoned trial lawyer, previously concluded and Judge Thompson, writing for the unanimous Ninth Circuit panel agreed, the jury should decide.

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asked are: How dark was it outside? Was the arrestee resisting? Where were people standing? What danger to the officers existed? What was said? Were there weapons? How were the weapons used if there were any? **What is the jury to do? Write essays?** This myriad of factual questions cannot be enumerated in a special verdict form.

CONCLUSION

The right outcome is to let *Graham* do the job it is well designed to do and, above all else, preserve the right to jury that, as Chief Justice Rehnquist and Justice Scalia have taken the time to thoughtfully prove, historically was at the very core of the Bill of Rights and one of the main conditions for support of the ratification of the Constitution. Once theory and practice are coupled in this case, this Court can fulfill its solemn duty as the guardian of the Bill of Rights, and still insure the protection for law enforcement officials to carry out the duties from which we all benefit.

There are times when trying to fix a non-existent problem creates one. Petitioner's effort is one of them. *Graham* works well. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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